INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	3
Summary of argument	9
Argument:	
I. The parties' construction of Section 106(a) is consonant with a literal reading of the words	13
A. Though petitioner does not challenge the determination of deportability, he is nevertheless seeking review of a final order of deportation	13
B. Paragraph (4) of Section 106(a) is not inconsistent with the parties' construction	21
II. The congressional intent that the judicial review procedures established by Section 106(a) extend to all justiciable issues arising out of a deportation proceeding, including discretionary determinations and eligibility rulings made in connection therewith, is confirmed by the legislative history	24
A. The declared purpose of the legislation was to eliminate district court review of "all questions which may arise in a deportation proceeding"	24
B. The legislative history also contains evidence of a specific intent to give the courts of appeals exclusive jurisdiction to hear any legal challenge to denials of discretionary relief	27
1. The case histories of abuse summarized in the committee reports include references to litigation arising out of discretionary determinations	27
2. The "deportation * * * procedures" chart reproduced in the committee reports indicates that the denial of discretionary relief is an ingredient of the "final order of deportation"	28

Page

3. The colloquy during the House debates between Representatives Walter, Lindsay, and Moore further indicates a purpose to make discretionary rulings reviewable under the new legislation 30

III. The subsidiary arguments relied on by the majority do not warrant its conclusion 35

A. It is not "in the last degree unlikely" that Congress meant to require that discretionary determinations be initially reviewed by a court of three judges ... 36

B. It is not "incredible" that Congress meant to burden courts of appeals with review of orders denying the privilege of voluntary departure 39

C. The parties' construction satisfactorily answers certain closely related questions as to the scope of Section 106(a) 40

1. Denials of withholding of deportation under Section 243(h) 40

2. Refusals to reopen deportation proceedings 51

Conclusion 55

Appendix A 57

Appendix B 89

Appendix C 94

CITATIONS

CASES:

Accardi v. *Shaughnessy*, 347 U.S. 260 19
Blagaic v. *Flagg*, 304 F. 2d 623 48
Dentico v. *Immigration and Naturalization Service*, 303 F. 2d 137 54
Gallegos v. *Immigration and Naturalization Service*, 310 F. 2d 688 52
Giova v. *Rosenberg*, 308 F. 2d 347, pending on petition for certiorari, No. 15, Misc., O.T. 1963, No. 898 Misc., O.T. 1962 ..... 13, 51, 53
Hintopoulos v. *Shaughnessy*, 353 U.S. 72 22
Holz v. *Immigration and Naturalization Service*, 309 F. 2d 452 48
Hurn v. *Oursler*, 289 U.S. 238 7
Jay v. *Boyd*, 351 U.S. 345 ..... 22, 28, 31

Page

Kaloudis, United States ex rel. v. *Shaughnessy*, 180 F. 2d 489 22
Lam Man Chi v. *Bouchard*, 314 F. 2d 664 ..... 49, 50
Lefson v. *Esperdy*, 211 F. Supp. 769 7
Louie King Fong v. *Immigration and Naturalization Service*, 308 F. 2d 191 8
Mai Kai Fong v. *Immigration and Naturalization Service*, 305 F. 2d 239 50
Murillo-Aguilera v. *Immigration and Naturalization Service*, 313 F. 2d 141 52
Pezzulich v. *Esperdy*, unreported (S.D.N.Y., 60 Civ. 497, decided February 23, 1962) 7
Romero v. *International Terminal Operating Co.*, 358 U.S. 354 7
Roumeliotis v. *Immigration and Naturalization Service*, 304 F. 2d 453, certiorari denied, 371 U.S. 921 48
Zupicich v. *Esperdy*, 207 F. Supp. 574 48

STATUTES:

Act of June 28, 1940, c. 439, § 20, 54 Stat. 671 18
Act of December 29, 1950, 64 Stat. 1129, as amended, 5 U.S.C. 1031 *et seq.* (Hobbs Act) 13, 57
Administrative Procedure Act:
§ 10 (5 U.S.C. 1009) 36
§ 10(e) (5 U.S.C. 1009(e)) 36
Immigration and Nationality Act, 66 Stat. 163 *ff.*, as amended:
§ 106 (8 U.S.C. [1958 ed., Supp. IV] 1105a) 57
§ 106(a) (8 U.S.C. [1958 ed., Supp. IV] 1105a(a)):
Generally 6, 9, 10, 12, 13, 14, 16, 20, 21, 23, 24, 27, 28, 30, 36, 37, 38, 39, 40, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57
Par. (1) 30, 58
Par. (4) 35, 58
§ 241(a)(2) (8 U.S.C. 1251(a)(2)) 3, 4
§ 242 (8 U.S.C. 1252) 20, 61
§ 242(b) (8 U.S.C. 1252(b)) 14, 20, 23, 48, 62
§ 243 (8 U.S.C. 1253) 61
§ 243(a) (8 U.S.C. 1253(a)) 41, 43, 66
§ 243(h) (8 U.S.C. 1253(h)) 12, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 68
§ 244 (8 U.S.C. 1254) 4, 8, 68
§ 244 (8 U.S.C. [1958 ed., Supp. IV] 1254) 18, 74

Page

§ 244(a) (8 U.S.C. 1254(a)) 12, 16, 47, 68
§ 244(a)(5) (8 U.S.C. 1254(a)(5)) 4, 6, 71
§ 244(e) (8 U.S.C. 1254(e)) 4, 74
§ 244(f) (8 U.S.C. [1958 ed., Supp. IV] 1254(f)) 78
§ 405 (8 U.S.C. 1101, Note) 57
Immigration Act of 1917, as amended, § 19(c) and (d) (8 U.S.C. [1940 ed.] 155(c) and (d)) 18
Public Law 87-301, approved September 26, 1961, 75 Stat. 651:
§ 5(a) 6, 57
§ 5(b) 57
Public Law 87-885, approved October 24, 1962, § 4, 76 Stat. 1247 8

REGULATIONS:

8 C.F.R. (1943 Cum. Supp.):
§ 90.3(a)(1) 19
§ 150.6(g) 19
§ 150.6(h) 19
§ 150.7 19
§ 150.8(b) 20
§ 150.9 19

8 C.F.R. (1949 ed.):
§ 90.3(a)(2) 19
§ 90.9 19
§ 150.6(c) 19
§ 150.6(g) 19
§ 150.6(h) 19
§ 150.7 19
§ 150.8 20
§ 150.9 19

8 C.F.R. (rev. 1952):
§ 6.1(b)(2) 19
§ 6.2 20
§ 242.53(c) 19
§ 242.54(d) 19
§ 242.61(a) 19
§ 242.61(c) 19
§ 242.61(e) 19
§ 242.61(f) 19
§ 244.1(b) 19
§ 244.2 19
§ 244.12 19

8 C.F.R. (rev. 1958): Page

§ 6.1(b)(2) 19, 29
§ 6.1(c) 29
§ 6.21 20
§ 242.1(a) 80
§ 242.1(b) 80
§ 242.14(a) 80
§ 242.16(b) 19, 80
§ 242.16(c) 19, 81
§ 242.16(e) 19, 81
§ 242.17(a) 81
§ 242.17(c) 82
§ 242.18 ..... 19, 46, 82
§ 242.20 ..... 19, 29, 82
§ 242.21(b) 19, 82-83
§ 243.1 ..... 42, 83
§ 243.1(a) 42, 83
§ 243.1(b) 42, 83
§ 243.2 ..... 42, 83
§ 243.3(a) 42, 83
§ 243.3(b)(1) 84
§ 243.3(b)(2) 43, 45, 84
§ 243.3(b)(3) 43, 85
§ 244.1 19
§ 244.2 19
§ 244.12 19

8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963):
§ 3.1(a) 78
§ 3.1(b)(2) 19, 29, 45, 79
§ 3.1(c) 29, 45, 79
§ 3.1(d)(2) 45, 79
§ 3.1(h)(1) 45, 79
§ 3.2 20
§ 242.16(c) 19
§ 242.17(a) 19, 85
§ 242.17(b) 19, 86
§ 242.17(c) 44, 86
§ 242.17(d) 45, 87
§ 242.18(a) 19, 45, 87
§ 242.18(c) 19, 44, 88
§ 242.20 ..... 19, 29, 45, 88

Page

8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) continued:

§ 242.21 ..... 19, 45, 88
§ 242.22 20
§ 244.1 19

23 F.R. 6543 81
23 F.R. 9123 ..... 82, 83
26 F.R. 12112 85
26 F.R. 12114 ..... 43, 85
27 F.R. 9647 88

CONGRESSIONAL MATERIALS:

104 Cong. Rec. 17172-17173 25
105 Cong. Rec. 12724-12726 26
105 Cong. Rec. 12728 ..... 31, 32, 33, 34
105 Cong. Rec. 12729 34
107 Cong. Rec. 12177 25
Hearing before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d sess., on H.R. 13311, July 10, 1958, p. 23 26
H.R. 13311, 85th Cong., 2d sess. 26
H.R. 2807, 86th Cong., 1st sess. 26, 29
H.R. 187, 87th Cong., 1st sess. 25
H. Rep. 2478, 85th Cong., 2d sess. 24, 25, 28
H. Rep. 423, 86th Cong., 1st sess. 24, 25, 28, 31, 94
H. Rep. 565, 87th Cong., 1st sess. 24, 25, 28, 94
H. Rep. 1086, 87th Cong., 1st sess. 24, 25
S. 2237, 87th Cong., 1st sess. 30

MISCELLANEOUS:

Comment, *Deportation and Exclusion: A Continuing Dialogue between Congress and the Courts*, 71 Yale L. Journ. 760.. 35
Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 5.14, 5.17 42

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 28

FRANCESCO FOTI a/k/a FRANK FOTI, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The majority (R. 7-23) and dissenting (R. 24-35) opinions in the court of appeals, sitting *en banc*, are reported at 308 F. 2d 779.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1962 (R. 36). The petition for a writ of certiorari was filed on October 20, 1962, and was granted on January 7, 1963 (R. 37; 371 U.S. 947). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (1958 ed., Supp. IV) 1105a (a), which vests in the courts of appeals exclusive jurisdiction to review "all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act," applies to a deportation order (issued pursuant to proceedings under Section 242(b)) in respect of which the issue of deportability is not in dispute, the basis of the challenge to the order being a claim that the administrative authorities erred in denying a form of discretionary relief from deportation which they had authority to grant.[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of (1) Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 (8 U.S.C. [1958 ed., Supp. IV] 1105a), (2) Sections 242 and 243 of the same Act, 66 Stat. 208-214, 8 U.S.C. 1252, 1253, (3) Section 244 of the same Act as it read at the time of the deportation proceedings here involved, 66 Stat. 214, 8 U.S.C. 1254, (4) Section 244 as amended by Public Law 87-885, approved October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. [1958 ed., Supp. IV] 1254), (5) Part 3 of Title 8 of

[1] The order granting certiorari (R. 37; 371 U.S. 947) limited the scope of the writ to question 1 presented by the petition, which reads: "Whether or not the Circuit Court of Appeals has jurisdiction to review the final orders of the Special Inquiry Officer authorized by the Attorney General to be made during the course of deportation proceedings." We have rephrased the question in a manner which in our view frames the issue more precisely.

the Code of Federal Regulations, (6) Parts 242 and 243 of Title 8 of the Code of Federal Regulations as they read at the time of the enactment of Section 106 of the Immigration and Nationality Act, *supra*, and (7) Part 242 as it now reads—appear in Appendix A, *infra*, pp. 57-88.

STATEMENT

Petitioner, a 47-year-old alien, a native and citizen of Italy, last entered the United States on or about November 16, 1950, on a seaman's visa, which authorized him to stay in this country for a period not to exceed 29 days (R. 1-2). He remained here illegally for more than ten years, leaving his wife and three minor children in Italy (R. 2, 8). On June 2, 1961, he was directed to appear before a special inquiry officer of the Immigration and Naturalization Service and show cause why he should not be deported under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an alien who had unlawfully overstayed the period for which he had been admitted. On June 9, 1961, he appeared with counsel before a special inquiry officer, at a hearing regularly conducted under Section 242(b) of the Act (Appendix A, *infra*, pp. 62-64), conceded his deportability, and applied, in the alternative, for two forms of discretionary relief from deportation which the Attorney General was authorized by the Act to grant to deportable persons who met defined eligibility requirements (R. 1-2).

Pursuant to Section 244(a)(5) of the Act, as it then read[1] (Appendix A, *infra*, pp. 68, 71-72),[2] the alien requested the privilege of suspension of deportation on the ground that it would be difficult for him to earn a living for his family in Italy if he were deported (R. 2). Pursuant to Section 244(e) (Appendix A, *infra*, p. 74), he requested the privilege of voluntary departure at his own expense in lieu of deportation (R. 1). The special inquiry officer denied the application for suspension of deportation—on the ground that petitioner did not qualify for that form of relief by reason of failure to meet the "hardship" eligibility requirement imposed by Section 244(a)(5)[3]—but granted petitioner's alternative request for the privilege of voluntary departure (R. 1-3). On September

---

[2] Section 244(a)(5) of the Act, as it then read, authorized the Attorney General to suspend the deportation of aliens in petitioner's situation (*i.e.*, aliens who were deportable under Section 241(a)(2) for having remained longer in the United States than the periods for which they had been admitted) if they could qualify for such relief under other eligibility requirements therein prescribed. Section 244 was subsequently amended so as (*inter alia*) to make aliens who entered the United States as crewmen ineligible for its benefits. The relevance of this amendment to the present case is discussed *infra*, at pp. 8-9.

[3] Among the eligibility requirements prescribed by Section 244(a)(5) was the requirement that the Attorney General be satisfied that deportation of the alien would result in "exceptional and extremely unusual hardship"—either to the applicant himself or to a close relative (spouse, parent or child) who was either a citizen or lawfully resident alien. The special inquiry officer, in addition to holding that petitioner failed to qualify for relief under this test, further held, as an alternative basis of denial of this form of relief, that, even assuming for purposes of the decision that petitioner met minimum eligibility requirements, the relief sought should be denied as a matter of administrative discretion (Appendix B, *infra*, p. 91).

19, 1961, the following order was entered (Appendix B, *infra*, p. 91):

> IT IS ORDERED that in lieu of an order of deportation respondent be GRANTED VOLUNTARY DEPARTURE without expense to the Government, within such time and under such conditions as the District Director shall direct.
>
> IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States in the manner provided by law, on the charge contained in the Order To Show Cause.

Petitioner appealed to the Board of Immigration Appeals from so much of the order of the special inquiry officer as denied his request for suspension of deportation. The Board, on November 28, 1961, dismissed the appeal (R. 1-3).[4] On the following day, November 29, the District Director for the New York District of the Immigration and Naturalization Service—in accordance with the special inquiry officer's order of September 19, 1961, *supra*—directed petitioner to effect his departure on or before December 18, 1961, and notified him that, in the event he failed to do so, his deportation to Italy had been directed (Appendix B, *infra*, pp. 92-93).

On or about December 15, 1961, petitioner commenced an action in the United States District Court

---

[4] The Board stated that it agreed with the special inquiry officer's determination that petitioner was ineligible for suspension of deportation because of failure to meet the "hardship" requirement (R. 3). It did not refer to the alternative basis of the special inquiry officer's decision (see fn. 3, *supra*, p. 4).

for the Southern District of New York in which he sought declaratory and injunctive relief from the refusal by the Service to grant his request for suspension of deportation (see R. 6). The district court dismissed the action on the ground that under Section 106(a) of the Immigration and Nationality Act, as added by Public Law 87-301, § 5(a), approved September 26, 1961 (Appendix A, *infra*, pp. 57-61), the sole and exclusive procedure for the judicial review of such a determination was by a petition for review filed in an appropriate court of appeals (see R. 6).

On January 15, 1962, pursuant to Section 106(a), and in accordance with the district court's interpretation of the section, petitioner filed in the Court of Appeals for the Second Circuit a petition entitled "Petition to Review and Set Aside an Order of Denial of Suspension of Deportation" (R. 4-6), in which he sought judicial review of the Service's determination that he was ineligible for the privilege of suspension of deportation because of failure to qualify under the "hardship" test (R. 5-6). The government, while requesting dismissal of the petition on the merits, agreed with petitioner that the court had jurisdiction under Section 106(a) to hear it. On September 21, 1962, the court of appeals, sitting *en banc* and by a 5-4 vote, dismissed the petition for lack of jurisdiction (R. 7-36). It held that the term "final orders of deportation" does not include a denial of discretionary relief under Section 244(a)(5) even though the denial of that relief is embraced in a final order of deportation, thus remitting petitioner to a proceeding in the district court. It concluded, in effect, that an order of deportation is within the purview of Section 106(a) *only* if the petition for review challenges the underlying

adjudication of deportability. Should the petition for review challenge the determination of deportability *and* the denial of discretionary relief, the majority believed, "bifurcation of the road to review" might be required; *i.e.*, the court of appeals might be required to review the adjudication of deportability while the district court was reviewing the discretionary determination (R. 15). The majority acknowledged that this might be "inconvenient", and remarked that it "might be tempting" in such a situation "to take whatever liberties with the language of § 106(a) were needed to avoid" such a result (*ibid.*). But since the present case did not present that problem, the majority found it unnecessary to consider it further.[5]

The dissenting judges were of the view that the majority's construction was "artificially literal" (R. 24). Relying primarily on the legislative history of the section (R. 26-28, 32-35), they concluded that the majority's interpretation "frustrated the legislative purpose" and "saddled the litigants and the courts with a

---

[5] It would be the government's position that, whatever may be the answer to the question presented by the present case (*i.e.*, whichever court—the court of appeals or the district court—has jurisdiction where deportability is not challenged and the sole basis of attack on the deportation order is the refusal to grant some form of discretionary relief), where the petition for review challenges both the determination of deportability and the denial of discretionary relief, the court of appeals has jurisdiction, under the principle of "pendent jurisdiction" (cf. *Hurn* v. *Oursler*, 289 U.S. 238; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 380-381), to hear and determine the entire controversy. See *Lefson* v. *Esperdy*, 211 F. Supp. 769 (S.D.N.Y.), and *Pezzulich* v. *Esperdy*, unreported (S.D.N.Y., 60 Civ. 497, decided February 23, 1962), so holding.

complicating, overlapping, and delaying additional form of deportation review" (R. 24).[6]

---

[6] As we advised the Court in our supplemental memorandum, filed May 22, 1963, calling to the Court's attention a possible question as to mootness, Congress, on October 24, 1962, subsequent to the court of appeals' decision and while the case was pending before this Court on petition for certiorari, enacted—effective as of the same date—Public Law 87-885, § 4, 76 Stat. 1247, providing (in relevant part) that Section 244 of the Immigration and Nationality Act—the source of the Attorney General's power to suspend the deportation of eligible classes of aliens—was amended by the addition of the following new subsection, (f) (Appendix A, *infra*, p. 78):

> (f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; * * *.

Since petitioner concededly entered the United States as a crewman, the government will argue, when the merits of this case are reached, that petitioner is now absolutely ineligible for the relief which he seeks, on a ground independent of that on which the administra-

---

[6] In *Louie King Fong* v. *Immigration and Naturalization Service*, 308 F. 2d 191, the only other decision to our knowledge involving a factual situation precisely on all fours with the present case (*i.e.*, where the challenge was to the denial of an application for suspension of deportation, deportability not being in issue), the Ninth Circuit assumed, without discussion, contrary to the holding below in this case, that it had jurisdiction. Other lower court decisions, dealing with the applicability of Section 106(a) to various related types of orders and situations, will be referred to at appropriate points in the Argument.

tive authorities rested (*supra*, p. 4). We do not believe, however, for the reasons stated in our supplemental memorandum, that the amendment had the effect of mooting the *jurisdictional* issue, the sole question before this Court under the limited writ of certiorari, *viz.*, whether or not the court of appeals has authority under Section 106(a) to hear the merits. It is accordingly the view of the government, as stated in the supplemental memorandum, that the Court should, notwithstanding the amendment, hear and determine the latter issue.

SUMMARY OF ARGUMENT

I

The parties' construction of Section 106(a) is consonant with a literal reading of the words.

A. Section 106(a) gives to the courts of appeals exclusive jurisdiction to review "all final orders of deportation." The present case comes literally within the statutory words. Petitioner is seeking review of a final order of deportation. While it is the denial of his request for suspension which he challenges, and not the adjudication of deportability, the phrase "all final orders of deportation" applies to all such orders, whether the particular ground of challenge is that the determination of deportability is unfounded or that a request for discretionary relief was wrongfully denied. For, ever since the Attorney General was first given the statutory authority, in 1940, to grant discretionary relief, the power has in fact been exercised, under the governing regulations, prior to the entry of any deportation order—so that, where relief has been granted, this has been accomplished, not by canceling a previous-

ly issued order, but simply by not issuing such an order in the first instance.

Assuming that the regulations might have prescribed a different procedure—one under which a request for discretionary relief would not be considered until after a final order of deportation had been entered—we would urge that the order of deportation which was left in effect by the denial of relief subsumed the denial, and that the latter ruling would accordingly be reviewable under Section 106(a) as an incident of the order. This conclusion, while not required by the words of Section 106(a), would certainly do no violence to them. The majority's construction does them violence under the procedure actually followed, by cutting the phrase "final orders of deportation" down to adjudications of deportability, thereby inviting bifurcation of review of a single administrative proceeding between the circuit and district courts. The best guide for determining the congressional intent as to the scope of review under Section 106(a) would seem to be the familiar usages and practices which were actually followed when the section was enacted and which composed the context of the legislation.

B. Paragraph (4) of the "exceptions" to Section 106(a)—providing that the petition for review shall be determined solely upon the administrative record and that the Attorney General's findings of fact, if supported by substantial evidence, shall be conclusive—is not inconsistent with the parties' construction. This clause admittedly applies only to the adjudication of deportability. But it does not follow that the principal provision of Section 106(a) is also thus limited. The majority assumes that the scope of this subdivision of the section is coextensive with the principal enactment.

But there is nothing surprising in a congressional decision to include in an overall enactment dealing with the judicial review of all final orders of deportation a specific provision pertinent to the principal constituent of such an order—the determination of deportability.

II

The congressional intent that the judicial review procedures established by Section 106(a) should extend to *all* justiciable issues arising out of a deportation proceeding, including discretionary determinations and eligibility rulings made in connection therewith, is confirmed by the legislative history.

A. The declared purpose of the legislation was to eliminate district court review of "all questions which may arise in a deportation proceeding". The core of Congress's plan was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices, which had come to the attention of Congress, whereby persons subject to deportation were forestalling enforcement by dilatory tactics in the courts.

B. The legislative history also contains evidence of a specific intent to give the courts of appeals exclusive jurisdiction to hear any legal challenge to denials of discretionary relief. The case histories of abuse of the judicial review process, summarized in the committee reports, include references to litigation arising out of discretionary determinations. A reference chart reproduced in the reports shows that the denial of discretionary relief is a constituent part of the "final order of deportation." And a colloquy during the House debates further indicates a purpose to make discretionary rulings reviewable under the new legislation.

III

The subsidiary arguments relied on by the majority do not warrant its conclusion.

A. It is not "in the last degree unlikely" that Congress meant to require that discretionary determinations be initially reviewed by a court of three judges. The setting aside of an administrative determination on the ground of arbitrariness is a serious judicial function. Much of the litigation in this area, moreover, involves disputed eligibility issues and frequently presents pure questions of statutory construction. The majority's assumption, more importantly, cannot be squared with the declared purpose of Section 106(a) to eliminate one stage of the review process (the district court stage) in order to frustrate dilatory tactics.

B. The last-mentioned consideration also refutes the majority's suggestion that it is "incredible" that Congress meant to burden courts of appeals with review of orders denying voluntary departure.

C. 1. Contrary to the majority, it is not irrational to conclude that Section 106(a) did not extend, when enacted, to denials of withholding of deportation under Section 243(h) (anticipated physical persecution in destination country)—as we concede—while it did, and does, extend to denials of suspension of deportation under Section 244(a)—as we maintain. The modes of processing applications for these forms of relief were, when Section 106(a) was enacted, wholly different. The final order of deportation did not formerly reflect the denial of the application for Section 243(h) relief; such an application was determined subsequently by an official other than the special inquiry officer who presided at the deportation proceeding and entered the

final order of deportation. (As a result of a subsequent change in the regulations, a Section 243(h) application is now processed in the deportation proceedings and its denial is reflected in the final order.)

2. The majority's hypothetical question as to whether Section 106(a) extends to an order refusing to reopen a deportation proceeding—the issue in *Giova* v. *Rosenberg,* 308 F. 2d 347 (C.A. 9), pending on petition for certiorari, No. 15 Misc.—is concededly a difficult one. Although not literally a final order of deportation, such an order is nevertheless, in our view, so directly linked with the deportation proceedings which culminated in the deportation order that it should be deemed ancillary for purposes of review. But whether or not such an order is within the scope of Section 106(a), an order denying suspension of deportation should be deemed within its coverage, since it has always been considered an ingredient of the final deportation order and was unmistakably intended by Congress to be included. Even if Congress failed to achieve all of its purposes, the statute must nonetheless be ungrudgingly applied to the full extent that its language fairly permits.

ARGUMENT

I

THE PARTIES' CONSTRUCTION OF SECTION 106(A) IS CONSONANT WITH A LITERAL READING OF THE WORDS

A. Though petitioner does not challenge the determination of deportability, he is nevertheless seeking review of a final order of deportation

Section 106(a) of the Immigration and Nationality Act provides that the procedure prescribed by the Act of December 29, 1950, 64 Stat. 1129, as amended, 5 U.S.C. 1031 *et seq.* (the "Hobbs" Act)—by which the

courts of appeals are vested with exclusive jurisdiction to review final orders of certain designated federal agencies—shall apply to, and be the exclusive procedure for, judicial review of

> all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act * * *.

The present case comes literally within the statutory words. Petitioner is seeking review of a final order of deportation.[7] The challenge is not to the adjudication of deportability but to the denial of a discretionary exception; however, the phrase "all final orders of deportation" applies, literally, to all such orders, whether the particular ground or basis of challenge is that the determination of deportability is unfounded or that error was committed or discretion abused in the denial, during the Section 242(b) proceedings, of a request for discretionary relief. For, as we shall point out (*infra*, pp. 17-21), ever since 1940, when the Attorney General was first given the power to grant discretionary relief in deportation cases, the authority has

---

[7] The special inquiry officer's order granting petitioner the privilege of voluntary departure was combined with a contingent directive that an order of deportation become "immediately effective," "without further notice or proceedings," if petitioner failed to depart when and as required by the district director (*supra*, p. 5). Upon petitioner's failure to depart within the time prescribed (*supra*, p. 5), the deportation order accordingly took effect. The petition for review, while denominated a petition for review of "an Order of Denial of Suspension of Deportation" (R. 4; *supra*, p. 6), was in substance and effect a challenge of the resulting final order of deportation as well (see, *e.g.*, R. 6).

in fact been exercised, under the governing regulations, prior to the entry of any deportation order—so that, where the relief sought has been granted, no such order has been entered. In other words, where relief has been granted, this has been accomplished not by canceling a previously issued order, but by refraining from entering such an order in the first instance.

We strongly disagree, therefore, with the suggestion in the majority opinion below (see, *e.g.*, R. 9, 10, 17, 18, 19, 22) that only its interpretation is consistent with the natural meaning of the words. The court held, in effect, that it would not review the order of deportation because the ground for challenge was not that the adjudication of deportability was wrong but that deportation should have been suspended under a discretionary exception. Thus, were it not for the point next to be noted, we would feel warranted in urging that it is the court below that has distorted the plain meaning of the words by implying what the language nowhere suggests.

Judge Friendly's opinion reasons, however, that the administrative practice of determining the question of deportability and ruling on any application for discretionary relief in a single proceeding—culminating in a final order of deportation where the decision goes against the alien in both respects—is not required by the statute. The Attorney General's regulations, in other words, *could* have provided that an application for discretionary relief would not be considered until after a final order of deportation had been entered. The order would then be canceled or left standing depending upon the ruling. Assuming that such a procedure would have been permissible under

the statute,[7a] we would urge that had such been the practice, the order which was left in effect by the denial of relief subsumed the denial, and that the latter determination would accordingly be reviewable under Section 106(a)—to the extent that it was subject to judiciary scrutiny—at the same time as the adjudication of deportability (if that was challenged). This conclusion, we concede, would not be required by the words, but it would do no substantial violence to them. (See on this point the discussion by Judge Clark at R. 31-32.)

Perhaps the fairest appraisal, therefore, is that while our interpretation might put some strain on the words of Section 106(a) under a procedure that *might* be followed, Judge Friendly's construction does them violence under the procedure actually followed, by cutting the phrase "final orders of deportation" down to adjudications of deportability, thereby inviting bifurcation of review of a single administrative proceeding between the circuit and district courts (R. 15). Splintering of the process of judicial review, we suggest, would be particularly unfortunate inasmuch as the prevailing administrative practice permits concurrent disposition of the various issues in a deportation case and thus avoids any practical necessity or justification for a series of appeals. See *infra* pp. 41-46.

In determining which of the two plausible construc-

[7a] But see former Section 244(a) (Appendix A, *infra*, pp. 68-72), requiring, as to all but one of the classes of aliens therein made eligible for suspension of deportation (defined in five numbered paragraphs), that the applicant shall *not* have been served with a final order of deportation under the 1952 Act. Paragraph (1), which did not contain this restriction, expired by operation of law in 1957, prior to the enactment of Section 106(a). As amended on October 24, 1962, Section 244(a) no longer contains this limitation (Appendix A, *infra*, pp. 74-75).

tions is to be adopted, the best guide to the congressional meaning would seem to be the usage and practices that composed the context of the legislation. Certainly, the close supervision that congressional committees exercise over the administration of the immigration and nationality laws justifies the inference that they were familiar with the prevailing usages and therefore used the term "final orders of deportation" advisedly.

It should be noted initially that, prior to 1940, the Attorney General had no discretion with respect to the deportation of an alien who came within a defined category of deportable persons. The expulsion of such a person was mandatory; his only avenue of relief, in a hardship case, was by private bill. Accordingly, any differentiation that might have been made prior to 1940 between a determination by the Attorney General that an alien was *deportable* and the order directing his *deportation* would have been merely formalistic. In fact, the determination of deportability necessarily resulted in, and was invariably accompanied by, a deportation order.

This situation, however, was fundamentally changed by the enactment, on June 28, 1940, of legislation which, for the first time, gave to the Attorney General the authority, in defined circumstances, and in his discretion, to grant relief from the normal consequences of a finding that an alien was deportable. Two forms of relief were authorized. Subject to prescribed restrictions, the Attorney General was authorized (1) to permit an alien whom he found to be deportable to depart from the United States at his own expense in lieu of deportation (the so-called privilege of voluntary departure), or (2) to suspend the alien's deportation if

he found that deportation would result in serious economic detriment to a citizen or lawfully resident spouse, parent, or minor child of the alien (suspension of deportation).[8] With the introduction of this executive dispensing power into the immigration laws, the determination of deportability, which had in the past been the practical equivalent of an order of deportation (since it necessarily resulted in such an order), no longer had this automatic effect. In all cases involving an alien who was (or claimed to be) eligible for one of the authorized forms of discretionary relief and chose to apply for it during the deportation proceedings, the adjudication of deportability became, instead, merely the first step—an indispensable one to be sure—leading to the entry of such an order. Though *deportability* was determined, an *order of deportation* might never eventuate—depending upon the disposition made of the application for discretionary relief, including the resolution of any disputed eligibility issue.

This dispensing authority of the Attorney General—with amendments not here material—has remained a

---

[8] Act of June 28, 1940, c. 439, § 20, 54 Stat. 671, amending Section 19 of the Immigration Act of 1917 by the addition of two new subsections, (c) and (d) (8 U.S.C. [1940 ed.] 155(c) and (d)). The operative provisions as to both forms of relief were contained in subsection (c); subsection (d) excepted certain enumerated classes of deportable persons from the latter subsection's provisions. If suspension of deportation was granted, the facts were required to be reported to Congress at the beginning of its next regular session. If, during that session, Congress, by concurrent resolution, disapproved the Attorney General's action, the alien was to be deported; otherwise the deportation proceedings—subject to certain further limitations if the alien's last entry had been illegal—were to be permanently canceled and the alien's status adjusted to that of a lawful resident. The substance of the two subsections, with amendments, is now contained in Section 244 of the 1952 Immigration and Nationality Act, as amended, 8 U.S.C. (1958 ed., Supp. IV) 1254 (Appendix A, *infra*, pp. 74-78).

fundamental part of the immigration laws to the present time. From the beginning, by regulations having the force and effect of law,[9] it has been exercised as an integral part of the administrative proceedings which have led to the issuance of a final deportation order; *i.e.*, it has been exercised by the delegate of the Attorney General who has had the authority to issue the order of deportation, and the officer's decision has been made in the proceedings which, if the relief sought was denied, culminated in the order. The consequence has been that, where the relief prayed for has been *granted*, there has been no deportation order—only an order granting voluntary departure or suspension of deportation, as the case might be.[10] It has never been the practice, in other words, *first* to hold a hearing on the issue of deportability—eventuating, where deportability was established, in a deportation order—and *thereafter* to entertain an application for discretionary relief from the order in a separate proceeding.[11] For this reason, an alien who has failed to make timely application for discretionary relief during the deportation proceedings, and who has subsequently manifested

---

[9] See *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265.

[10] Of course, as in this case (see *supra*, p. 5), an order granting voluntary departure may be combined with a *contingent* deportation order—directing that the alien be deported *if* he fails to depart within the time prescribed.

[11] For the pertinent regulations, see 8 C.F.R. (1943 Cum. Supp.) §§ 90.3(a)(1), 150.6(g) and (h); 150.7, 150.9; 8 C.F.R. (1949 ed.) §§ 90.3(a)(2), 90.9, 150.6(c), (g), and (h), 150.7, 150.9; 8 C.F.R. (rev. 1952) §§ 6.1(b)(2), 242.53(c), 242.54(d), 242.61(a), (c), (e), and (f), 244.1(b), 244.2, 244.12; 8 C.F.R. (rev. 1958) §§ 6.1(b)(2), 242.16(b), (c), and (e), 242.18, 242.20, 242.21(b), 244.1, 244.2, 244.12; 8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) §§ 3.1(b)(2), 242.16(c), 242.17(a) and (b), 242.18(a) and (c), 242.20, 242.21, 244.1.

desire to seek such relief (after an order of deportation had been entered), has been required by the regulations to seek leave to have the proceedings reopened for that purpose.[12]

Further illustrative of the fundamental differentiation now made by the immigration laws between an adjudication of deportability (the first step) and an order of deportation (the final one) is the fact that Section 242 of the Act—the section specifically concerned with the procedure leading to, and the incidents and effects of, final orders of deportation—repeatedly distinguishes between the determination of deportability and the order of deportation, speaking at times in terms of the one and at times in terms of the other (Appendix A, *infra,* pp. 61-66). For example, Section 242(b)—which has particular pertinence here since Section 106(a), in describing the "final orders of deportation" intended to be encompassed therein, refers in terms to administrative proceedings "under section 242(b)"—provides that "A special inquiry officer shall conduct proceedings under this section to *determine the deportability* of any alien, * * * and, as authorized by the Attorney General, shall make determinations, *including orders of deportation*" (emphasis added).

In short, for more than twenty years prior to the enactment of Section 106(a), the term "final orders of deportation"—the subject matter and key phrase of that section—has had a meaning and significance, understood by those familiar with the deportation proc-

[12] 8 C.F.R. (1943 Cum. Supp.) § 150.8(b); 8 C.F.R. (1949 ed.) § 150.8; 8 C.F.R. (rev. 1952), § 6.2; 8 C.F.R. (rev. 1958) § 6.2; 8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) §§ 3.2, 242.22.

ess, which has been carefully differentiated from the preliminary adjudication of deportability. For this reason we cannot agree with the majority that its construction, which for all practical purposes equates the order of deportation with the determination of deportability, is alone compatible with the natural sense of the terms used. We think, rather, that the phrase "final order of deportation" was intended to refer, as the words themselves fairly suggest, to the ultimate administrative decree—the culmination of the deportation process—that the alien be expelled from the country. Such a directive, as we have seen, is based upon, but does not necessarily result from, the adjudication of deportability.

B. Paragraph (4) of Section 106(a) is not inconsistent with the parties' construction

The principal provision of Section 106(a)—making the Hobbs Act applicable to the judicial review of all final orders of deportation—is followed by nine numbered paragraphs of exceptions (Appendix A, *infra*, pp. 58-61). One of these, paragraph (4), provides, with a subsidiary exception not here material, that

> the petition [for review] shall be determined solely upon the administrative record upon which the deportation order is based, and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.

We agree that this provision applies only to the adjudication of deportability. Congress could not have intended it to apply to a discretionary determination, such as that on an application for suspension of deportation. For, as the majority observed (R. 20-21), the

Attorney General, in suspension proceedings, may in some circumstances find facts, and consequently exercise discretion, on the basis of information not in the administrative record; judicial review must accordingly take this possibility into account. *Jay* v. *Boyd*, 351 U.S. 345, 358. And, as the majority further noted (R. 21), since suspension of deportation "is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict" (*United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C.A. 2), quoted with approval in *Jay* v. *Boyd, supra*, 351 U.S. at 354, n. 16), the "reasonable, substantial, and probative evidence" standard of judicial review is manifestly inapplicable. Cf. *Jay* v. *Boyd, supra*, at 354; *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77.

The majority reasons that since paragraph (4) unquestionably applies only to adjudications of deportability, this must also be true of the principal provision of the section; in other words, that the "final orders of deportation" which form the subject matter of the principal provision must likewise be understood as limited to the adjudications of deportability (R. 20-22). The argument has some force; but it rests upon the assumed premise that the scope of each subdivision is coextensive with the principal enactment, and that is not necessarily true.

The fact that Congress, in one of several "exceptions" to the principal provision of Section 106(a), included a proviso which could only apply to determinations of deportability does not at all necessarily indicate that the principal provision was also intended to be thus limited. The adjudication of deportability is, after all, the principal—and indispensable—ingredient

of the ultimate product known as the final order of deportation. It would not be strange, therefore, for Congress to include in an overall enactment dealing with the judicial review of all final orders of deportation a specific provision pertinent to the principal constituent of such an order.

It should be observed, moreover, that paragraph (4) of Section 106(a), to the extent that it lays down a judicial standard of review of deportation orders (the provision that the Attorney General's findings of fact, if supported by "reasonable, substantial, and probative evidence," are to be conclusive), substantially duplicates the standard of review which had already been prescribed in prior legislation, *viz.*, Section 242 (b), eighth sentence, item (4) (Appendix A, *infra*, p. 63), (requiring that the regulations of the Attorney General include a requirement that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence"). Significantly, the standard of review as articulated in this prior provision was explicitly tied to the "decision of deportability." Had paragraph (4) of Section 106(a), with similar explicitness, referred to the "decision of deportability"—and all are agreed that this is precisely the paragraph's intent—the majority's argument based on that paragraph would obviously lose its point. For in that event it would be apparent that Congress, in paragraph (4), was merely emphasizing a fact having special pertinence to a particular aspect (the adjudication of deportability) of a broader subject (the judicial review of final orders of deportation). It is the government's view that this in fact was all that Congress intended to accomplish by paragraph (4), and that the inference which the majority drew

from the latter as to the intended scope of the principal provision of Section 106(a) is accordingly unwarranted.

II

THE CONGRESSIONAL INTENT THAT THE JUDICIAL REVIEW PROCEDURES ESTABLISHED BY SECTION 106(A) EXTEND TO ALL JUSTICIABLE ISSUES ARISING OUT OF A DEPORTATION PROCEEDING, INCLUDING DISCRETIONARY DETERMINATIONS AND ELIGIBILITY RULINGS MADE IN CONNECTION THEREWITH, IS CONFIRMED BY THE LEGISLATIVE HISTORY

A. The declared purpose of the legislation was to eliminate district court review of "all questions which may arise in a deportation proceeding"

The fundamental purpose of Section 106(a), its legislative history discloses, was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices, which had come to Congress's attention, whereby persons subject to deportation were forestalling enforcement by dilatory tactics in the courts. The chief feature of Congress's plan was the elimination of the previous first step in judicial review—a suit in the district court—and the consequent limitation of the review to the courts of appeals, subject only to the certiorari jurisdiction of this Court.

The objective of the new legislation, the House Committee on the Judiciary declared in reporting out the bill, was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation * * * of aliens from the United States." H. Rep. 1086 on S. 2237, 87th Cong., 1st sess., p. 22. And see, to the same effect, the following reports accompanying predecessor bills (all identical, in relevant parts, with one another and with S. 2237): H. Rep. 2478 on H.R. 13311, 85th Cong., 2d sess., p. 2; H. Rep. 423 on H.R. 2807, 86th Cong., 1st sess., p. 1; H. Rep. 565

on H.R. 187, 87th Cong., 1st sess., p. 1. "The Committee on the Judiciary," the report went on to explain,

> has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country. * * *
>
> The alien whose sole immigration offense is, perhaps, a defect in his visa, or an over-extended stay as a visitor, usually accepts the order of deportation and departs. Other aliens, mostly subversives, gangsters, immoral, or narcotic peddlers, manage to protract their stay here indefinitely only because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process. Without any reflection upon the courts, it is undoubtedly now the fact that such tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act by repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings. * * *

H. Rep. 1086, *supra,* pp. 22-23. To the same effect see H. Rep. 2478, *supra,* pp. 2-3; H. Rep. 423, *supra,* p. 2; H. Rep. 565, *supra,* pp. 1-2.

In further elucidating the purpose of the proposed legislation on the floor of the House of Representatives, Congressman Walter, who, as chairman of Subcommittee No. 1 (immigration and nationality affairs among others) of the House Committee on the Judiciary, was the author and chief sponsor of the measure (see 107 Cong. Rec. 12177), said (104 Cong. Rec. 17172-17173):

Mr. Speaker, the purpose of this legislation is to provide a method of judicial review of deportation orders and to spell out the procedure so that aliens who are under deportation orders and who can afford it, cannot find access to the courts by some subterfuge or other, interminably. * * *

* * * * * * * * *

The proposed bill declares that all the provisions of the act of December 29, 1950, shall apply to and shall be the sole and exclusive procedure for the judicial review of orders of deportation of aliens within the United States. * * * Instead of the multitudinous and repetitive court reviews now available by virtue of judicial interpretations, the bill sets up a special single form of judicial review by the court of appeals. This will guarantee the person in question that by a review by an appellate court he will be getting justice to the fullest extent, and to the same extent as persons aggrieved by orders of other Federal agencies * * *. *Most important, by eliminating review in the district courts, the bill would obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding.* [Emphasis added.] [13]

* * * * * * * * *

---

[13] Representative Walter's statement was made on August 12, 1958, in reference to H.R. 13311, 85th Cong., 2d sess., one of the predecessor bills. See also 105 Cong. Rec. 12724-12726, where Mr. Walter, on July 6, 1959, repeated the substance of his earlier statement, referring in this instance to H.R. 2807, 86th Cong., 1st sess. Cf. the observation of Assistant Attorney General Anderson, appearing as a witness on behalf of H.R. 13311, that the procedure prescribed by the bill "would avoid a great deal of delay by eliminating one step in the judicial review, that of the district court" (Hearing before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d sess., on H.R. 13311, July 10, 1958, p. 23).

Since, from the beginning (see *supra*, pp. 18-20), applications for suspension of deportation and voluntary departure have been made and determined in and as integral parts of the deportation proceedings, "all questions which may arise in a deportation proceeding" would seem without question to include all justiciable issues arising out of the disposition of such applications, including rulings as to the applicants' eligibility for the relief sought. Cf. Mr. Walter's further statement on the floor of the House, referred to *infra*, p. 34, that "the 6 months' period on the question of finality of an order applies to the *final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings*" (emphasis added). Thus, the above-quoted explanatory statement by the author and principal sponsor of the proposed legislation strongly corroborates the parties' interpretation of its intended scope.

B. The legislative history also contains evidence of a specific intent to give the courts of appeals exclusive jurisdiction to hear any legal challenge to denials of discretionary relief

1. The case histories of abuse summarized in the committee reports include references to litigation arising out of discretionary determinations

As examples of the evils which the proposed legislation was designed to correct, the committee reports accompanying the bills which eventuated as Section 106(a) contained a number of case histories, prepared by the Immigration and Naturalization Service, of proceedings in which, in the committee's and the Service's view, there had been abuse of the judicial process by dilatory or repetitive suits for review. Included among them were several in which the alien had sought,

inter alia, review of orders denying suspension of deportation.[14] When considered in conjunction with Congressman Walter's explanation of the purpose of the measure on the House floor (*supra,* pp. 25-26) and the similar explanations set forth in the committee reports (*supra,* pp. 24-25), these references to discretionary determinations and the litigation arising out of them are strongly corroborative evidence of Congress's intent to include issues having their origin in such discretionary rulings among the questions removed from the district courts under Section 106(a).

2. The "deportation * * * procedures" chart reproduced in the committee reports indicates that the denial of discretionary relief is an ingredient of the "final order of deportation"

Even more significant is a chart, entitled "Deportation Case Procedures", which is reproduced in two of the relevant committee reports (H. Rep. 423, 86th Cong., 1st sess., p. 20; H. Rep. 565, 87th Cong., 1st sess., p. 27). Each report explains that the chart, "outlining administrative procedures in deportation cases," was being printed "for reference purposes" (H. Rep. 423, p. 19; H. Rep. 565, p. 26). The chart illustrates, in diagrammatic form, the administrative steps leading to a "Final Order of Deportation." A central vertical line leads from a rectangular box at the top, captioned "Deportable Alien in United States," through other boxes labeled "Order to Show Cause" and "Hearing

[14] See, *e.g.*, the summaries as to the following aliens: *William Heikkila,* including the reference to *Jay* v. *Boyd,* 351 U.S. 345, a suspension case (H. Rep. 2478, 85th Cong., 2d sess., pp. 4, 14-15; H. Rep. 423, 86th Cong., 1st sess., pp. 3, 16-18; H. Rep. 565, 87th Cong., 1st sess., pp. 11, 20-23); *Hamish Scott MacKay* (H. Rep. 2478, pp. 15-16; H. Rep. 423, p. 18; H. Rep. 565, pp. 23-24); *Joseph Accardi* (H. Rep. 2478, pp. 16-17; H. Rep. 423, pp. 18-19; H. Rep. 565, pp. 24-25); *Leonard Costa* (H. Rep. 565, pp. 25-26).

by Special Inquiry Officer," to a bottom box bearing the legend "Final Order of Deportation." Extending horizontally to the left from the "Hearing by Special Inquiry Officer" box is a line leading to another box, which is divided into two segments, called "Voluntary Departure" and "Termination of Proceedings." Extending horizontally to the right from the "Hearing" box is a like line, leading to still another box, which is similarly divided into two parts, labeled "Deportation" and "Suspension of Deportation." Similar horizontal lines, extending to either side from the vertical line connecting the "Hearing" box to the "Final Order of Deportation" box, are linked to additional boxes denominated "Certification to Board of Immigration Appeals" and "Appeal of Decision to Board of Immigration Appeals."[15] For the Court's convenience the chart is reproduced in Appendix C, *infra*, p. 94.

Thus, according to the chart, the "Final Order of Deportation" is the final product which results from (1) the special inquiry officer's determination that the alien is deportable,[16] (2) the officer's denial of the privilege of voluntary departure or suspension of deportation where a request for one or the other of these forms of relief has been made, and (3) the failure by the Board of Immigration Appeals to disturb either of

---

[15] The Board of Immigration Appeals may acquire jurisdiction in a deportation proceeding either through *appeal* by the alien or the Service's prosecuting officer from an adverse decision by the special inquiry officer, or by *certification* of the case by the Commissioner (or other authorized officer of the Service) or the Board itself. 8 C.F.R. (rev. 1958) §§ 6.1(b)(2) and (c), 242.20; 8 *id.* (Cum. Pocket Supp. as of January 1, 1963) §§ 3.1(b)(2) and (c), 242.20 (Appendix A, *infra*, pp. 79, 82).

[16] The box-segment marked with the single word "Deportation" manifestly refers to the adjudication of deportability.

these determinations in the event that the alien exercises his right of appeal to that body. The chart thus further substantiates and confirms the construction of Section 106(a) proposed by the parties.

3. The colloquy during the House debates between Representatives Walter, Lindsay, and Moore further indicates a purpose to make discretionary rulings reviewable under the new legislation

Further corrobative of the correctness of the parties' construction is a colloquy between Representatives Walter, Lindsay, and Moore, which occurred on July 6, 1959, during the House debates on H.R. 2807, 86th Cong., 1st sess.—one of the predecessor bills to S. 2237, 87th Cong., 1st sess., the measure by which Section 106(a) was enacted during the following Congress.[17] The colloquy is discussed in both opinions below (R. 19-20, 32-33, 34). We agree with the dissenting judges that the identity of the participants (see *infra*, pp. 30-31, 32, 34) gives the colloquy unusual importance in ascertaining the legislative intent.

One subdivision of H.R. 2807—which eventually appeared as Section 106(a)(1), 8 U.S.C. (1958 ed., Supp. IV) 1105a(a)(1) (Appendix A, *infra*, p. 58)—provided that the petition for review might be filed "not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later." The colloquy in question began with the following exchange between Congressman Walter and Representative Lindsay of New York (who, as noted by the dissenting judges, R. 33, was thoroughly familiar with the part played by discretionary determinations in the deportation process as a consequence of his having represented the government,

[17] The two bills were identical in relevant part.

three years earlier, in *Jay* v. *Boyd*, 351 U.S. 345, the now controlling case with respect to the review of orders of deportation involving denials of suspension of deportation) (105 Cong. Rec. 12728):

MR. LINDSAY: Mr. Speaker, will the gentleman yield?

MR. WALTER: I yield to the gentleman from New York.

MR. LINDSAY: One question on the subject of final orders of deportation and the 6 months' limitation on filing a petition for review following the final order of deportation: As the gentleman knows, the proposed bill provides that a petition for review may be filed not later than 6 months from the date of the final deportation order or from the date of this act, whichever is the later. Do I understand that that means that the 6-month period will not benefit the alien until the exhaustion of all the administrative remedies of whatever sort? Is that correct?

MR. WALTER: That is correct.

MR. LINDSAY: The gentleman knows that the immigration regulations are complicated and subject to change by the executive branch. The administrative review of orders of deportation sometimes can take different courses; so I would suggest that we make sure that the history of this is absolutely clear, that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.

MR. WALTER: That is correct. The final order means the final administrative order.

MR. LINDSAY: I thank the gentleman.

MR. MOORE: That is correct.

MR. LINDSAY: *Is it not true that the words "final deportation order" does not take effect until after determination of the question of suspension?*

MR. MOORE: *That is the manner in which I understand the meaning of the term as used in the pending bill.*

* * * * * * * * *

MR. WALTER: Mr. Speaker, during the course of the discussion the gentleman from New York raised the question of suspension of deportation. *I might say to the gentleman from New York that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings.* [Emphasis added.]

Having received this assurance, Mr. Lindsay made a brief speech advocating the enactment of the bill (105 Cong. Rec. 12728-12729), and it passed the House a few moments later (105 Cong. Rec. 12729).[20]

The weight of these expressions is great, indeed, when one considers the identity of the participants: Representative Walter, the author and chief proponent of the measure under discussion, and one of the congressional leaders in the whole area of immigration law; Representative Moore, co-sponsor of the bill, by whom it was reported out; and, "asking the important questions," Representative Lindsay, who, as noted above, was thoroughly conversant with the problems in this area. It was, moreover, as the dissent further

[20] The bill failed, however, to pass the Senate during that Congress. A successor bill was enacted into law during the following Congress (see *supra*, pp. 24-25).

observed (R. 33), only after repeated assurances were given that "The final order means the final administrative order," and that the " 'final deportation order' does not take effect until after determination of the question of suspension," with the ultimate statement by Mr. Walter himself that "the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings," that the bill was passed.

It is true, to be sure, that the primary focus of attention during the colloquy was on the six-month limitations period and the point of time at which it would commence to run, rather than on the scope of review as such. Nevertheless we think it fair to conclude from the nature of the assurances which were given that all present understood, at the conclusion of the discussion and before the voting, that any issue which might arise out of the denial, during the deportation proceedings, of a request for discretionary relief would be as subject to review under the bill as the primary adjudication of deportability itself.[21]

III

THE SUBSIDIARY ARGUMENTS RELIED ON BY THE MAJORITY DO NOT WARRANT ITS CONCLUSION

We have already discussed the majority's principal reason for rejecting the parties' construction of Section 106(a), *viz.*, that, since it is beyond dispute that paragraph (4) of the "exceptions" to the principal

[21] Cf. Comment, *Deportation and Exclusion: A Continuing Dialogue between Congress and the Courts*, 71 Yale L. Journ. 760, 763-764, n. 20 (1962) (quoted in relevant part in footnote 7 of the dissent (R. 33)).

Under the regulations of the Attorney General in effect when Section 106(a) was enacted (September 26, 1961), the authority to designate the country of deportation was exercised by the local district directors. 8 C.F.R. (rev. 1958) § 243.1(b) (Appendix A, *infra*, p. 83). The district director did not make the designation until after the order of deportation had been entered and become final. 8 *id.* § 243.1(a) (Appendix A, *infra*, p. 83). Ordinarily, indeed, the designation was not made until some time after the issuance of the so-called "warrant" of deportation (the instrument by which an officer of the Service was authorized to take the alien into custody and physically deport him), and no administrative appeal lay from the district director's specification of the country to which the alien was to be sent. 8 *id.* §§ 243.1, 243.2, 243.3(a) (Appendix A, *infra*, pp. 83); see Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 5.14, 5.17.

Since, under the regulations in effect when Section 106(a) was adopted, the designation of the country of deportation was not made until after the issuance of the warrant of deportation, at a time when the alien's physical removal from the country was imminent, a request by the alien for Section 243(h) relief—*i.e.*, that his deportation to the country designated be temporarily withheld on the ground that he would be subject to physical persecution if deported there at that time—was necessarily required to be made and determined in proceedings separate and distinct from the deportation proceedings, which had eventuated in the "final order of deportation." In other words, under the then-existing regulations, a motion for Section 243(h) relief assumed the existence of an outstanding final deportation order. Specifically, it was

required that an alien who claimed that he would be subjected to physical persecution in the country designated move the Service for a stay of his deportation for the purpose of presenting his Section 243(h) request. 8 *id.* § 243.3(b)(2) (Appendix A, *infra*, p. 84). He was required to appear before a special inquiry officer—not necessarily the officer who presided at the deportation hearing—for the presentation of his evidence and interrogation under oath. The special inquiry officer then prepared a memorandum of his findings and a recommendation as to the proper disposition of the motion. These were sent to the local regional commissioner, who had the final decision—from which no administrative appeal lay—as to whether deportation should be withheld and, if so, for what period of time. 8 *id.* § 243.3(b)(2) and (3) (Appendix A, *infra*, pp. 84-85).

Subsequent to the enactment of Section 106(a), the regulations governing both the procedure for designating the country of deportation and the manner of processing a Section 243(h) motion were substantially and relevantly revised. Under the new regulations, which were published December 19, 1961, and took effect on January 22, 1962 (26 F.R. 12114), both the designation of the country of deportation and the determination of any Section 243(h) request for relief which the alien might wish to make are effected in the deportation proceedings and reflected in the final order of deportation. Specifically, under the regulations now in force, the special inquiry officer who presides at the deportation proceedings notifies the alien during the proceedings that, *if* he should be finally ordered deported, his deportation will in the first instance be directed, pursuant to Section 243(a), to any country

A moment later Representative Moore, the member of the Judiciary Committee who reported out the bill under consideration,[18] said (*ibid.*):

> Opponents of this legislation raise one point which deserves further explanation.
>
> They claim that in some cases aliens may be induced to file court proceedings for review of their deportation order even though they may qualify for administrative or legislative relief. Let me give an example. Under section 244 of the present Immigration and Nationality Act (8 U.S.C., sec. 1254) an alien against whom a final order of deportation is issued may under certain conditions have his deportation suspended and his status adjusted to that of an alien admitted for permanent residence. Ordinarily a request for suspension of deportation under this section is not made until after the determination that the alien is deportable. However, since there is no provision for tolling the 6-month period of review under the bill because of such post-deportation proceedings, it is claimed that the alien may feel compelled to file his case in court even though he has a basis for administrative relief. And once a case is filed in court, the Immigration Service may be precluded from concurrently considering a request for administrative relief because of the exclusive jurisdiction of the court over the case.
>
> These circumstances are admittedly undesirable. However, they are not irreparable. The alien does not forfeit any avenues of administrative relief, but at most, simply has to postpone their enforcement. I have concluded that the real remedy for this situation is to be sought in a change in the present administrative practice of considering the issues of deportability and suspension of deporta-

[18] H. Rep. 423, 86th Cong., 1st sess.

tion piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief. That would remove this objection entirely. I am hopeful that this matter will be given further study by the committee in the near future."[19]

The following then occurred (*ibid.*):

MR. LINDSAY: Mr. Speaker, will the gentleman yield?

MR. MOORE: I yield to the gentleman from New York.

MR. LINDSAY: A moment ago I asked the gentleman from Pennsylvania [Mr. Walter] whether or not it was correct to say that the 6 months period would not begin to run until after the exhaustion of all administrative remedies. In my question I assumed that suspension of deportation would be included as an administrative remedy. In other words, the question of deportability would be decided one way or the other. Assuming the alien was found to be deportable, then he goes back for further administrative relief. He asks for suspension of deportation proceedings. It may take a while before there is a determination on that question.

[19] Mr. Moore was mistaken in his apparent assumption that under the existing regulations the alien had no opportunity to apply for suspension of deportation, and the administrative authorities gave no consideration to such an application, until after the entry of a final order of deportation. As we have previously pointed out (*supra*, pp. 18-20), the regulations have required from the beginning that the alien file his application for discretionary relief during the deportation proceedings, prior to the issuance of a deportation order. The "issues of deportability and suspension of deportation," in other words, were *not* considered "piecemeal," as Mr. Moore thought, but, on the contrary, were considered in the same proceeding and prior to the issuance of a final order of deportation.

provision of that section applies only to the determination of deportability, the principal clause of the section should likewise be deemed limited to the deportability adjudication (*supra*, pp. 21-24). The subsidiary arguments pressed by the majority opinion are also unpersuasive.

A. It is not "in the last degree unlikely" that Congress meant to require that discretionary determinations be initially reviewed by a court of three judges

One of the difficulties which the majority found with the parties' construction of Section 106(a) was its conviction that (R. 12)—

> especially [22] since the general command of the Administrative Procedure Act as to judicial review, 5 U.S.C. § 1009, excepts action which "is by law committed to agency discretion," it would seem in the last degree unlikely that Congress meant to require that a decision resting in executive grace, as to which the scope of any review is so narrow, must be initially reviewed by a court of three judges * * *.

This criticism is, in our view, unsound for several reasons.

1. First, while Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, excepts from judicial review agency action which "'is by law committed to agency discretion,'" this exception is qualified by the subsequent provision of the same section, § 10(e), 5 U.S.C. 1009(e), that the reviewing court "shall * * * hold

---

[22] The word "especially" was added to the opinion subsequent to its original filing, and does not appear in the copy contained in the printed record. The emendation is reflected in the opinion as reported at 308 F. 2d 779 (see p. 782).

unlawful and set aside agency action * * * found to be (1) arbitrary, capricious, [or] an abuse of discretion * * *." In other words, agency action which by law is committed to agency discretion is exempt from judicial review *except* where discretion has been abused—in which case the court is empowered and directed to set the action aside. One who claims that discretionary authority has been exercised in so arbitrary a manner as to require judicial intervention obviously bears a severe burden of proof. But where abuse has occurred and can be established by a sufficient showing, the duty to set aside the offending action is manifestly a judicial function of the highest seriousness. There is no reason for assuming, therefore, that Congress, in enacting Section 106(a), could not have intended that it be discharged in the first instance by a court of three judges.

2. Secondly, not all challenges of denials of applications for discretionary relief from deportation consist merely of claims of abuse of discretion, as the majority's present point appears to assume. Much of the litigation in the area of discretionary determinations, and perhaps the greater part, involves disputed issues relating to the alien's statutory eligibility for the relief sought. (Cf. this case (*supra*, pp. 4, 6).) In such cases the question of the propriety of an executive exercise of discretion is not involved, since discretion has not in fact been exercised. An eligibility issue, moreover, may well involve, and often does involve, a pure question of statutory construction—the type of issue which is within the special competence of a court of appeals.

3. Thirdly, and most important, this criticism fails, we submit, to give adequate recognition to the funda-

mental purpose of Section 106(a), as disclosed by its legislative history. That objective, as we have pointed out (*supra*, pp. 24-27), was to shorten the procedure for the review of deportation orders by eliminating the district court stage—the normal first step in the review process. This was part of a carefully planned effort by Congress to thwart the designs of aliens under outstanding deportation orders who, desirous of forestalling their deportation for as long a time as possible, seek to achieve their objective through resort to dilatory review tactics. Under the decision below, an alien under an order of deportation who had applied for and been denied a form of discretionary relief from deportation, and who chose to seek judicial review of the discretionary determination, would be required to file his suit in the first instance in a district court—with, of course, the right to appeal from an adverse determination to the court of appeals. Certainly, this right would be exercised by the class of deportees who were the principal source of congressional concern—those intent upon delay. In such cases, the court of appeals would not escape the need to decide ultimately the issue of the propriety of the discretionary ruling; the issue would simply come before it at a later time, and in a slightly different procedural context—"by appeal from the district court" instead of "by way of petition for agency review," as the dissent below noted (R. 32). In the meantime the alien would have succeeded in prolonging his stay in this country by an interval equal to the time during which his case was pending in the district court—in direct frustration of the basic objective of Section 106(a). Thus, far from being "in the last degree unlikely" that Congress meant to require discretionary determinations to be initially reviewed by

the courts of appeals, as the majority thought, the declared purpose of the section would be in substantial measure defeated if such determinations were to continue, as in the past, to be reviewed by the district courts.

B. It is not "incredible" that Congress meant to burden courts of appeals with review of orders denying the privilege of voluntary departure

A second difficulty which the majority found with the parties' construction was that it seemed (R. 18)—

> hard to sustain that an order of a special inquiry officer denying suspension comes within § 106(a) whereas one made in the same proceeding denying voluntary departure is not; yet it is quite incredible that Congress meant to burden courts of appeals with review of orders of the latter sort * * *.

We cannot agree, however, with the majority's assumption that it is "quite incredible" that Congress intended that the courts of appeals should have jurisdiction under Section 106(a) to review orders denying voluntary departure. On the contrary, we submit, when the primary objective of the section is kept in mind—*viz.*, the frustration of efforts to forestall the carrying out of deportation orders through resort to dilatory review tactics—there is compelling basis for concluding that Congress intended denials of voluntary departure to be quite as subject to court of appeals review as denials of suspension, and for the same reasons. For otherwise there would be nothing to prevent an alien bent on delay from first seeking review of such an order in a district court—the majority does not question, and indeed it is undisputed, that he may seek review of it in some court—and then proceeding

by way of appeal (if he loses in the district court) to litigate the same issue in the court of appeals. Meanwhile he would have achieved the very purpose—delay—which Section 106(a) was designed to prevent so far as possible.

C. The parties' construction satisfactorily answers certain closely related questions as to the scope of Section 106(a)

A third difficulty which the majority found with the parties' construction was that it fails to provide satisfactory solutions to certain closely related questions as to the reach of Section 106(a), in particular whether the section extends to denials of "withholding" of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h) (Appendix A, *infra*, p. 68), and to the denial of a motion to reopen a deportation proceeding after a deportation order has been entered and become final (R. 17-18). Since the instant case does not involve a denial of either of the latter types, it is not necessary, strictly speaking, for the Court to consider issues pertaining to them at this time. We recognize, nevertheless, that the question of the applicability of Section 106(a) to such related types of orders has at least peripheral relevance to the issue directly presented, and is one, moreover, on which the lower courts are sharply divided. We accordingly shall attempt to show that the parties' construction does provide a solution to these cognate questions, and that the majority's criticism of it on this score is consequently unsound.

1. Denials of withholding of deportation under Section 243(h):

Before presenting the majority's specific criticism based on Section 243(h), and our reply to it, it is necessary, in order that the point of the supposed difficulty

be properly assessed, to relate briefly the nature of the relief authorized by Section 243(h), and the procedures, past and present, whereby applications for such relief have been heard and determined.

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a) (Appendix A, *infra*, pp. 66-68), prescribes rules for the guidance of the Attorney General in designating the country to which an alien found to be deportable is to be expelled. Subject to qualifications and limitations which need not be detailed, deportation is to be (1) to the country of the alien's choice if that country will receive him; or (2) if the alien makes no designation, or the country he selects is unwilling to receive him, then to the country of which he is a citizen or subject if it will accept him; or (3), if that country is unwilling to take him, then, in the Attorney General's discretion, to any one of seven other specified categories of countries—such as the country from which the alien last entered the United States, the country of his birth, etc. In recognition, however, of the fact that the political situation in the country designated by the Attorney General pursuant to the statutory scheme might be such that the alien would be subjected to physical persecution if deported there at the time of entry of the order of deportation, Congress has, in Section 243(h), authorized the Attorney General to

> withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

which the alien designates and which is willing to receive him, and the alien is given the opportunity then and there to make such designation. 8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) § 242.17(c) (Appendix A, *infra*, pp. 86-87). The special inquiry officer then specifies and states for the record the country (or countries in the alternative) to which the alien's deportation will be directed if the country which the alien designates declines to receive him or the alien elects not to make a designation. The officer further advises the alien that he may apply, pursuant to Section 243(h), for temporary withholding of his deportation to the country or countries specified by the officer, and the alien is allowed a period of not more than ten days in which to submit an application for such relief. If he submits such a request, the officer hears and determines it in the deportation proceedings—*before the issuance of any order.*" *Ibid.*

At the conclusion of the proceedings, the special inquiry officer enters his order, directing "the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate." 8 *id.* § 242.18(c) (Appendix A, *infra*, p. 88). If deportation is directed, the order is required to specify the country, or countries in the alternative, to which the alien is to be sent. *Ibid.* The decision must contain a discussion of the evidence pertaining to any application made by the alien during the proceedings and the officer's reasons for granting or denying

[22] Though the regulations are not specific on the point, the officer presumably conducts the hearing on the Section 243(h) application only after he has satisfied himself that the alien is deportable and that, if an application for suspension of deportation has been made, the alien is either ineligible for such relief or should be denied it as a matter of discretion.

the request. 8 *id.* § 242.18(a) (Appendix A, *infra*, p. 87). Presumably, though the regulations are not specific on the point, if the officer determines that the alien's deportation to the country named in the order should be temporarily withheld as authorized by Section 243(h), the order is to specify the period during which such withholding is to be effective—either in specific terms or until further notice.[24] The order of the special inquiry officer is declared by the regulations to be "final" unless the case is appealed or certified to the Board of Immigration Appeals. 8 *id.* §§ 242.20, 242.21 (Appendix A, *infra*, p. 88).[25] No other procedure for submitting and determining a request for relief under Section 243(h) is permitted. 8 *id.* § 242.17(d) (Appendix A, *infra*, p. 87).[26]

Thus, whereas under the former regulations the country of deportation was designated and an application for Section 243(h) relief was determined in pro-

---

[24] Cf. the provision of the prior regulations (8 C.F.R. [rev. 1958] § 243.3(b)(2) (Appendix A, *infra*, pp. 84-85)) requiring the regional commissioner, if his decision was to withhold deportation, to state "for what period of time" it was withheld (see *supra*, p. 43).

[25] A decision of the special inquiry officer may be appealed to the Board by the alien or the Service's prosecuting officer, or "certified" to that body by the Commissioner or other duly authorized officer of the Service, or by the Board itself. 8 *id.* §§ 3.1(b)(2) and (c), 242.20 (Appendix A, *infra*, pp. 79, 88). The decision of the Board is final except where review by the Attorney General is ordered. 8 *id.* § 3.1(d)(2) (Appendix A, *infra*, p. 79). A case is reviewed by the Attorney General if the Attorney General so directs, the chairman or a majority of the Board believes that it should be, or the Commissioner so requests. 8 *id.* § 3.1(h)(1) (Appendix A, *infra*, p. 79).

[26] The regulations specifically forbid construing of a request for Section 243(h) relief, or any other request for discretionary relief from deportation, as a concession either of alienage or of deportability. *Ibid.*

ceedings distinct from and postdating the deportation proceedings, and those functions were performed by officials other than the special inquiry officer who conducted the deportation proceedings and issued the final order of deportation, both functions are now performed in and as part of the deportation proceedings, and by the same officer who enters the final deportation order. And whereas formerly the deportation order simply directed that the alien "be deported," 8 C.F.R. (rev. 1958) § 242.18 (Appendix A, *infra*, p. 82), the order now specifies the country to which the alien is to be sent, and indicates, where there has been a request for temporary withholding under Section 243(h), whether the request has been granted or denied, and, if granted, for what period.

With the foregoing explanation of past and present procedures for processing a Section 243(h) application by way of background, we now turn to the majority's criticism of the parties' construction on the ground that it provides no satisfactory solution to the question whether Section 106(a) applies to denials of such applications as well as to denials of suspension of deportation. The majority said (R. 17-18):

> On the view taken by the Service here, was jurisdiction conferred on the courts of appeals only as to denials of suspension under § 244(a) or also as to withholding under § 243(h)? As the regulations stood when Congress acted, it would be hard to sustain the latter under the Service's theory, since the determination was made, not by the special inquiry officer who alone is named in § 242(b) but by the regional commissioner; yet the situations are so much alike that a construction including one and excluding the other would scarcely be rational. Since then the regulations have been

> amended, 26 F.R. 12113 (Dec. 19, 1961), so that the special inquiry officer-Board of Immigration Appeals procedure prevails also under § 243(h). We do not question the power of the Attorney General thus to alter the procedure under § 243(h), but it would be rather novel that an administrative regulation could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow, as, indeed, he can do under § 244. . . .

The majority's criticism is based, the government submits, on two untenable assumptions.

a. First, we disagree with the majority that, *under the regulations in effect when Section 106(a) was enacted,* the denial of suspension of deportation under Section 244(a) and the denial of withholding of deportation under Section 243(h) were "so much alike that a construction [of Section 106(a)] including one and excluding the other would scarcely be rational." On the contrary, we think that precisely such a distinction must be made. It is the government's view, in other words, that under the regulations formerly in effect Section 106(a) did not extend to denials of Section 243(h) relief, whereas it did extend (for the reasons we have previously outlined, see *supra,* pp. 13-35) to denials of suspension.[27]

Our conclusion that Section 106(a) did not originally extend to Section 243(h) denials has been reached with considerable reluctance, since the *spirit* of Section 106(a), particularly as illumined by its legislative his-

---

[27] We believe that under the *current* regulations Section 106(a) does extend to Section 243(h) denials (see *infra,* pp. 49-51).

tory (see *supra*, pp. 24-35), suggests that it may well have been the wish of Congress to remove all issues having any connection whatever with the deportation of aliens from the district courts and place them in the courts of appeals. We are confronted, nevertheless, by the fact that, if that indeed was what Congress intended, the language it employed was, in this particular respect, inadequate. Section 106(a) limits the grant of authority therein contained to the judicial review of "all final orders of deportation * * * made * * * pursuant to administrative proceedings under Section 242(b) * * *." Concededly, if these words are to be followed faithfully, it is difficult to see how the section can be construed to extend to a determination made *subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation.[28] But,

[28] The decisions are in conflict as to whether, under the regulations as they formerly read, the denial of Section 243(h) relief was within the scope of Section 106(a). The Seventh Circuit has held that it was, *Blagaic* v. *Flagg*, 304 F. 2d 623, while the Ninth Circuit, *Holz* v. *Immigration and Naturalization Service*, 309 F. 2d 452, and the District Court for the Southern District of New York, *Zupicich* v. *Esperdy*, 207 F. Supp. 574, have held that it was not. The Seventh Circuit reasoned that the question whether to grant or deny such relief "involves the execution or suspension of the deportation order"; that the question is "therefore * * * ancillary to the order;" that "[i]f the withholding of deportation is not granted, [the alien] will be deported"; and that "thus, in a realistic sense the denial of [withholding] is a part of the deportation order" (304 F. 2d at 625). (Cf. *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453, 454-455, certiorari denied, 371 U.S. 921, where the same court used similar reasoning in holding Section 106(a) to be applicable to the administrative denial, subsequent to the issuance of a final order of deportation, of a first preference visa.) Under the Seventh Circuit's approach,

granting that Congress may have failed initially to adopt language adequate to assure the achievement of its basic purpose in every situation within its broad contemplation, it surely does not follow that the answer is to deny implementation of the statute in the many other instances in which no such obstacle is encountered.

b. We submit furthermore—and this brings us to what we believe is the second untenable assumption in the majority's criticism quoted *supra*, pp. 46-47—that, *under the regulations now in force* (*supra*, pp. 43-46), the denial of Section 243(h) relief *is* subject to review under Section 106(a). Cf. *Lam Man Chi* v. *Bouchard*, 314 F. 2d 664, 674, n. 21 (C.A. 3) (involving the applicability of Section 106(a) to the designation of the country of deportation; see fn. 30, *infra*, p. 50). We take this position because, under the present practice, unlike the situation formerly prevailing, a Section 243(h) denial is made in the deportation proceedings, by the officer who conducts those proceedings and issues the final order of deportation, and is reflected in the order (see *supra*, pp. 42-46).[29] In other words, under

---

it would appear that any action of any immigration official which can in some sense be said to be "ancillary" to a deportation order, and which is of such a character that, had the decision gone the other way, the alien's deportation would as a practical matter not be carried out, or at least would be temporarily or indefinitely postponed, may be treated as though it were "part of" the deportation order (though in fact it was not), and hence as within the purview of Section 106(a). While the simplicity of this approach is not without appeal, we have been compelled to conclude, for the reasons stated in the text, that it cannot be sustained in the light of the actual language which Congress used in Section 106(a).

[29] There are no decisions to our knowledge involving the applicability of Section 106(a) to the denial of Section 243(h) relief under the present regulations.

the regulations currently in effect, the denial of Section 243(h) relief is an integral part of the "final order of deportation" to which Section 106(a) in terms refers.[35]

The majority assumed (*supra*, pp. 46-47) that it may not legitimately be concluded, as we suggest, that denials of Section 243(h) relief are now within the coverage of Section 106(a) whereas before the 1961-1962 change in the regulations they were not—because if that were so, the majority thought, it would mean that the Attorney General has the power, simply by changing his regulations, to expand the scope of the subject-matter jurisdiction which Congress has vested in the courts of appeals by statute. We cannot agree, however, with the majority's reasoning on this point. There is a sense, it is true, in which it can be said that the change of regulations, if it had the effect we have attributed to it, enlarged the courts of appeals' powers under Section 106(a). More properly viewed, however, the jurisdiction of the courts of appeals under Section 106(a) is limited now, as it was when Congress acted, to the review of all "final orders of deportation * * *." The

---

[35] We note parenthetically that we take the same position, and for the same reasons, with respect to the designation of the country of deportation. We think that, prior to the 1961-1962 change in regulations, *supra*, pp. 43-45, *i.e.*, when the country of deportation was still designated by the district director after the deportation order had been entered and become final (*supra*, p. 42), the specification of the place of deportation did not come within the scope of Section 106(a)—as the only two circuits which have expressly ruled on the point, the Third and the Ninth, have held. See *Lam Man Chi* v. *Bouchard*, 314 F. 2d 664 (C.A. 3); *Mai Kai Fong* v. *Immigation and Naturalization Service*, 305 F. 2d, 239, 242 (C.A. 9). On the other hand, we believe that under the regulations presently in effect the specification of the country of deportation is reviewable under Section 106(a), since it is now a part of the final deportation order (*supra*, pp. 43-46)—as the Third Circuit, in a *dictum* in the *Lam Man Chi* case, *supra*, indicated it also thought (314 F. 2d at 674, n. 21).

change in regulations, by which the procedures whereby Section 243(h) applications are processed were altered (a change which the majority had no doubt the Attorney General had power to make, see *supra*, p. 47), had the incidental effect of expanding the decisional content of such orders; they now reflect, whereas previously they did not, the administrative disposition of such applications. But in no substantial or legally tenable sense can it be said, we submit, that under the government's interpretation of the effect of the change in regulations the powers of the courts of appeals were augmented. Surely, there is nothing novel in the conclusion that changes in administrative procedures may affect the scope and content of particular types of agency orders and hence the subject matter embraced in a proceeding to review these orders.

2. Refusals to reopen deportation proceedings:

In further criticism of the parties' construction the court below said (R. 18):

> Then there is the case where the grievance is the refusal to reopen a deportation proceeding to permit an application for suspension to be filed * * *. Is such an order also a "final order of deportation"?

Under the court's construction of Section 106(a), such an order would of course not come within the section's purview, and the evident point of the court's comment was that the parties' interpretation is unacceptable because it is incapable of giving a satisfactory answer to the question the court posed.

Before we address ourselves to the merits of the court's hypothetical question, two preliminary observations should be made. First, the question put by the court is the specific issue presented in *Giova* v.

Rosenberg, 308 F. 2d 347 (C.A. 9), pending on petition for certiorari (acquiesced in by the government), No. 15 Misc., Oct. Term, 1963 (No. 898 Misc., Oct. Term, 1962).[21] Discussion of the question at this time, accordingly, may be of assistance to the Court in determining the proper disposition of that petition as well as in resolving the tangentially related issue presented in the instant case. Second, although the court below characterized the "refusal to reopen" of which it spoke as a refusal to reopen "to permit an application for suspension to be filed," the question would be no different, as the government sees it, if the motion to reopen had a different purpose—as, for example, the presentation of new evidence on the issue of deportability. In other words, the problem of the applicability *vel non* of Section 106(a) to an order denying a motion to reopen is the same, regardless of what the reason for the request may have been.

On the merits, it must be conceded that the question posed by the majority is a close one under the construction of Section 106(a) which the government has advocated. *Literally*, an order denying a motion to reopen is not a "final order of deportation." The order of deportation, by hypothesis, was previously entered and permitted to become final—either through failure to appeal to the Board of Immigration Appeals or by the Board's failure to disturb the order. It is plain, therefore, that if Section 106(a) is to be con-

[21] The Ninth Circuit held in the *Giova* case that a refusal to reopen a deportation proceeding is outside the scope of Section 106(a)—a position to which it has subsequently adhered in *Gallegos* v. *Immigration and Naturalization Service*, 310 F. 2d 688, and *Murillo-Aguilera* v. *Immigration and Naturalization Service*, 313 F. 2d 141.

strued with absolutely literal strictness, a refusal to reopen the proceedings is beyond its scope—as the court of appeals in the *Giova* case held.

We believe, nevertheless, that such an order should be deemed to come under Section 106(a). The principal reasons which persuaded us that orders designating the country of deportation and orders denying relief under Section 243(h) were not within the coverage of Section 106(a) prior to the change in regulations under which such orders are now made in the deportation proceedings (see *supra*, pp. 47-48; fn. 30, p. 50) do not apply to an order denying a motion to reopen. It is true that a refusal to reopen, like the designation of the country of deportation and the refusal to grant Section 243(h) relief under the prior practice, occurs subsequent to the final order of deportation. But, unlike those orders, an order denying a motion to reopen is made by the same officer who entered the final order of deportation—or, if the order was appealed to the Board of Immigration Appeals, then by that body, which, by its decision dismissing the appeal, in effect endorsed the deportation order and assumed responsibility for it—and is so directly linked with the deportation proceedings out of which the deportation order arose that it would, in the government's view, be *artificially* literal to attempt to distinguish between them. In other words, an order refusing to reopen the proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointlessly literal, and contrary to the sound administration of the immigation laws, to require that the subsidiary order be treated otherwise then as an adjunct of the principal order—comparable to the denial

of a motion for rehearing or reconsideration. So considered, it should be reviewable, in the government's opinion, in the same forum in which the principal order would have been reviewed if review of the latter had been sought.[22]

It bears repeating, however, that the problem of the applicability of Section 106(a) to refusals to reopen has but peripheral relevance to the issue posed in *this* case. Whatever may be the answer to the majority's hypothetical question, therefore, the justiciable issues arising from a refusal to grant a request for suspension of deportation should be held reviewable in the courts of appeals under Section 106(a). For such an order, as we have seen, has always been deemed a component part of the final deportation order, and was quite unmistakably intended by Congress to be within the coverage of that section. If Congress did fail to achieve all of its purposes, the statute must nonetheless be ungrudgingly applied to the full extent that its language fairly permits. This precept fully encompasses cases of the kind at bar.

---

[22] Of course, if the alien sought review of *both* the final order of deportation *and* the order refusing to reopen the proceedings, the court of appeals would without question, in the government's view, have complete jurisdiction of the entire controversy—under the "pendent jurisdiction" principle. See fn. 5, *supra*, p. 7. Cf. *Dentico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C. A. 2).

CONCLUSION

For the foregoing reasons the government respectfully submits, with petitioner, that the judgment of the court of appeals should be reversed and that the cause should be remanded to that court with directions to entertain the petition for review.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

JULY 1963.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

I. Statutes

1. Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 [33] (8 U.S.C. [1958 ed., Supp. IV] 1105a), provides:

JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION

Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.),[34] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or

---

[33] Section 5(b) of Public Law 87-301 (75 Stat. 653) provided that the newly enacted section was to take effect on the thirtieth day after its approval—*i.e.*, on October 26, 1961—and that, irrespective of the provisions of any other law, including Section 405 of the Immigration and Nationality Act (the saving clause of that Act, 8 U.S.C. 1101, Note), the new section was to be applicable to all administrative proceedings involving the deportation or exclusion of aliens, notwithstanding (1) that the person involved may have entered the United States prior to the effective date of the new section or of the Immigration and Nationality Act, or (2) that the administrative proceeding may have been commenced or conducted prior to the effective date of the new section or of that Act. It was further provided that any judicial proceeding to review an order of deportation which was pending unheard in any district court on the effective date of the new section (with certain exceptions) was to be transferred for determination to the court of appeals having jurisdiction to review the order under the new section.

[34] The Act of December 29, 1950 (the "Hobbs" Act), as amended, provides that the courts of appeals "shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" of certain designated federal agencies in proceedings under designated statutes (§ 2, as amended, 5 U.S.C. 1032).

hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to

have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

2. Sections 242 and 243 of the same Act, 66 Stat. 208-214, 8 U.S.C. 1252, 1253, provide in pertinent part:

APPREHENSION AND DEPORTATION OF ALIENS

Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in

subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish

the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the

Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. * * *

(d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore

or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. * * *

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a), who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: * * *

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order

of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

* * *

COUNTRIES TO WHICH ALIENS SHALL BE DEPORTED; COST OF DEPORTATION

Sec. 243. (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country

of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvis-

able, or impossible, then to any country which is willing to accept such alien into its territory.

* * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

3. Section 244 of the same Act, 66 Stat. 214, 8 U.S.C. 1254, provided at the time of the deportation proceedings here involved:

SUSPENSION OF DEPORTATION; VOLUNTARY DEPARTURE

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19 (d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose

deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(2) last entered the United States within two years prior to or at any time after the date of enactment of this Act; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of paragraph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(3) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under any law of the United States for an act committed or status acquired subsequent to such

entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under paragraph (1) of section 241 (a) insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 241 (a), as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such

entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation

would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

(b) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (1), (2), or (3) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case, shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If neither the Senate nor the House of Representatives shall, within the time above specified, pass such a resolution, the Attorney General shall cancel deportation proceedings. The provisions of this subsection relating to the granting of suspension of deportation shall not be applicable to any alien who is a native of any country contiguous to the United States or of any adjacent island,

unless he establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is

made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a), (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

4. Section 244 of the same Act, as amended by Public Law 87-885, approved October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. [1958 ed., Supp. IV] 1254), now provides:

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a); has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four

months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(c) (1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—

if during the session of the oCngress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14),

(15), (16), (17), or (18) of section 241 (a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

(f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; or (2) was admitted to the United States pursuant to section 101(a)(15)(J) or has acquired such status after admission to the United States; or (3) is a native of any country contiguous to the United States or of any adjacent island named in section 101(b)(5): *Provided,* That the Attorney General may in his discretion agree to the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

II. Regulations

1. Part 3 of Title 8 of the Code of Federal Regulations (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) provides in pertinent part:

PART 3—BOARD OF IMMIGRATION APPEALS

§ 3.1 *Board of Immigration Appeals*—(a) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, which shall be under the supervision and direction of

the Attorney General and shall be responsible solely to him. * * *

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

* * *

(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter.

* * *

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, or the Board may in any case arising under paragraph (b) of this section require certification of such case to the Board.

(d) *Powers of the Board—*

* * *

(2) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. * * *

* * *

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner requests be referred to the Attorney General for review.

* * *

2. Parts 242 and 243 of Title 8 of the Code of Federal Regulations (rev. 1958) provided in pertinent part at the time of the enactment of Section 106 of the Immigration and Nationality Act, *supra*, pp. 57-61 (September 26, 1961):

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

§ 242.1 *Order to show cause and notice of hearing*—(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the issuance and service of an order to show cause * * *. * * *

(b) *Statement of nature of proceeding.* The order to show cause will contain * * * a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing * * *. * * *

* * *

§ 242.14 *Evidence*—(a) *Sufficiency.* A determination of deportability shall not be valid unless based on reasonable, substantial, and probative evidence.

* * *

§ 242.16 *Hearing*—

* * *

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead

to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent.

(c) *Issues of deportability.* When deportability is not determined under the provisions of paragraph (b) of this section, the special inquiry officer shall request the assignment of an examining officer, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading.

* * *

(e) *Application for discretionary relief* [as amended August 21, 1958, 23 F.R. 6543]. The respondent may apply during the hearing for suspension of deportation on Form I-256A, voluntary departure under section 244 of the act, or such other discretionary relief as may be appropriate to the case. The respondent has the burden of establishing his eligibility for discretionary relief and may submit evidence in support of his application.

§ 242.17 *Decision of special inquiry officer*— (a) *Contents.* The decision of the special inquiry officer may be oral or written. Except in cases where deportation is determined on the pleadings pursuant to § 242.16(b) or (d), the decision shall include a summary of the evidence and shall set forth findings of fact and conclusions of law as to deportability. * * * The decision shall also con-

tain a discussion of the evidence relating to the respondent's eligibility for any discretionary relief requested and the reasons for granting or denying the application. The decision shall be concluded with the order of the special inquiry officer.

* * *

(c) *Use of non-record information.* In determining an application for discretionary relief from deportation in proceedings under this part, the special inquiry officer may consider and rely upon information not contained in the record only when the Commissioner has determined that it is in the interest of national security and safety to do so.

§ 242.18 *Order of special inquiry officer.* The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, with or without pre-examination, or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

* * *

§ 242.20 *Finality of order* [as amended November 14, 1958, 23 F. R. 9123, 9126]. The order of the special inquiry officer shall be final except when the case has been certified as provided in Part 3 or Part 103 of this chapter, or an appeal is taken to the Board of Immigration Appeals by the respondent or by the examining officer.

§ 242.21 *Appeals—*

* * *

(b) *Cases appealable* [as amended November 14, 1958, 23 F. R. 9123]. Pursuant to Part 3 of this chapter, an appeal shall lie from a decision of the special inquiry officer under this part to the Board of Immigration Appeals (except in cases covered by the provisions of § 242.20 relating to certifications). * * *

* * *

PART 243—DEPORTATION OF ALIENS IN THE UNITED STATES

§ 243.1 *Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien*—(a) *Issuance.* A warrant of deportation shall be based upon the final order of deportation and shall be issued by a district director or an immigration officer acting for him.

(b) *Determination of place and cost of deportation, and necessity for attendants.* District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported * * *.

§ 243.2 *Finality of decision.* No appeal shall lie from the decision of the district director in the exercise of the authority described in § 243.1.

§ 243.3 *Execution of warrants of deportation*—(a) *Taking alien into custody.* Upon the issuance of a warrant of deportation or as soon thereafter as the circumstances of the case require, the alien, if not in the physical custody of the Service, shall be taken into such custody under the authority of such warrant of deportation and deported.

(b) *Stay of deportation.* (1) Except as otherwise provided in this part, the district director having administrative jurisdiction over the place where the alien is located may, in the exercise of his discretion, and for good cause shown, stay the execution of a warrant and order of deportation for such time and under such conditions as he may deem appropriate. * * *

(2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be considered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner together with all the evidence and information submitted by the alien or which may be applicable to the case. The alien shall be served with a copy of the special inquiry officer's memorandum and recommendation and shall be allowed five days from date of service within which to submit written representations to the regional commissioner. If the alien refuses to appear for interrogation before a special inquiry officer when requested to do so or waives his appearance, all the pertinent evidence and available information in the case shall immediately be submitted to the

regional commissioner. The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information.

(3) * * * No appeal shall lie from a denial of a request for a stay of deportation * * *.

* * *

3. Part 242 of Title 8 of the Code of Federal Regulations now provides in pertinent part (rev. 1958, Cum. Pocket Supp. as of January 1, 1963)—effective, except as otherwise indicated, since January 22, 1962 (26 F.R. 12112, 12114):

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

* * *

§ 242.17 *Ancillary matters, applications.*

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* The respondent may apply to the special inquiry officer for suspension of deportation under section 244(a) of the Act, for adjustment of status under section 245 of the Act, or for creation of a record of lawful admission for permanent residence under section 249 of the Act; such applications shall be subject to the requirements contained in Parts 244, 245, and 249 of this chapter. The special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford him an opportunity to make application therefor during the hearing. In exercising discretionary

powers to grant or deny an application under this paragraph, the special inquiry officer may consider and rely upon information not contained in the record [illegible]vided the Commissioner has determined that it is in the interest of the national security and safety to do so.

(b) *Voluntary departure.* The respondent may apply to the special inquiry officer for voluntary departure in lieu of deportation pursuant to section 244(e) of the Act and Part 244 of this chapter.

(c) *Temporary withholding of deportation.* The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application

and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to physical persecution as claimed. The determination under section 243(h) of the Act may be based upon information not of record if, in the opinion of the special inquiry officer or the Board, the disclosure of such information would be prejudicial to the interests of the United States.

(d) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. * * *

§ 242.18 *Decision of special inquiry officer.*

(a) *Contents.* The decision of the special inquiry officer may be oral or written. Except when deportability is determined on the pleadings pursuant to § 242.16(b), the decision of the special inquiry officer shall include a discussion of the evidence and findings as to deportability. The formal enumeration of findings is not required. The decision shall also contain a discussion of the evidence pertinent to any application made by the respondent under § 242.17 and the reasons for granting or denying the request. The decision shall be concluded with the order of the special inquiry officer.

(c) *Order of the special inquiry officer.* The order of the special inquiry officer shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. The special inquiry officer is authorized to issue orders in the alternative or in combination as he may deem necessary.

* * *

§ 242.20 *Finality of order.*

The order of the special inquiry officer shall be final except when the case is certified to the Board as provided in Part 3 of this chapter or an appeal is taken to the Board by the respondent or the trial attorney.[35]

§ 242.21 *Appeals.*

Pursuant to Part 3 of this chapter an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. * * *

---

[35] The substitution of the words "or the trial attorney" for "or by the examining officer" took effect as of September 29, 1962 (27 F.R. 9647).

APPENDIX B

EXCERPTS FROM THE CERTIFIED ADMINISTRATIVE RECORD

1. Decision and Order of the Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

September 19, 1961

File: A-15724917—New York, New York

IN DEPORTATION PROCEEDINGS

IN THE MATTER OF

FRANCESCO FOTI a/k/a FRANK FOTI, *Respondent*

CHARGES:

I & N Act—Section 241(a)(2)—Remained longer—Nonimmigrant seaman

APPLICATION: Suspension of Deportation (Immigration and Nationality Act—Section 244(a)(5));

Or—Voluntary Departure.

In behalf of Respondent:
JAMES J. CALLY, ESQ.
150 Broadway
New York 38, New York

In behalf of Service:
NO ONE.

DECISION OF SPECIAL INQUIRY OFFICER

The respondent is a 45-year-old married male alien, a native and citizen of Italy, who last entered the United States at Norfolk, Virginia, on or about November 16, 1950, at which time he was admitted as a nonimmigrant seaman, authorized to remain in the United States for the period of time his vessel remained in port, not exceeding 29 days. Deportability

is conceded and is found to be established on the charge contained in the Order To Show Cause.

The respondent is married and has a wife and three children residing in Italy. His closest relative in the United States is his brother, alleged to be a United States citizen. The respondent until about a month ago was employed as a baker, working for his brother, earning $60. per week. He is now self-employed. His assets in the United States total $4500., consisting of $3000. in savings, and miscellaneous personal property valued at $1500.

As the respondent is chargeable to a quota which is oversubscribed at the present time, he could not readily obtain an immigrant visa if granted the privilege of voluntary departure. A check of the appropriate local and federal records has failed to reveal an arrest or criminal record against him. Affidavits of witnesses have been produced, vouching for the respondent's good moral character for the preceding ten years. A bank book, employment affidavit, affidavits of witnesses, and other documentary evidence have been submitted, on the basis of which a finding is warranted that the respondent has been continously physically present in the United States for at least the preceding ten years.

The respondent claims that his deportation would result in exceptional and extremely unusual hardship to himself because it will be difficult for him to earn a living for his family in Italy. In view of the fact that the Immigration and Nationality Act was intended to limit suspension of deportation to those cases in which the deportation of the alien would be considered unconscionable (Report of Senate Committee, January 29th, 1952, Calendar 1072, Page 25), the hardship to the respondent is not considered to meet this exacting requirement. Consequently he is considered to be ineligible for suspension of deportation.

Even if it be assumed for the purpose of this decision that the respondent meets the minimum statutory requirement for eligibility for suspension of deportation under the Immigration and Nationality Act, nevertheless as a matter of administrative discretion that privilege should not be extended to him. In view of the fact that he has resided in the United States barely in excess of the minimum ten year requirement, that his wife and children reside abroad, and that there are no outstanding equities in his favor, he does not merit the privilege of suspension of deportation. However, since he has resided in this country for over ten years, he should be afforded an opportunity to effect voluntary departure for which relief he is eligible. Upon his failure to depart when and as required, he should be deported. He has specified Italy as the country to which he prefers to be deported.

ORDER:

IT IS ORDERED that in lieu of an order of deportation respondent be GRANTED VOLUNTARY DEPARTURE without expense to the Government, within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States in the manner provided by law, on the charge contained in the Order To Show Cause.

HENRY I. MILLMAN
Henry I. Millman
Special Inquiry Officer

2. District Director's Direction to Foti to Effect His Voluntary Departure on or Before December 18, 1961

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

20 West Broadway
New York 7, N. Y.
November 29, 1961

Please Refer to This File Number
A15 724 917 DB

Francisco Foti
72-18 18th Avenue c/o Suraca
Brooklyn, N. Y.

Dear Sir:

Please note the below checked action which has been taken in your case.

In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before December 18, 1961.

You must notify this office on or before December 13, 1961 of the arrangements you have made to effect your departure, including the date, place and manner.

☒ Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and steps being taken to effect your deportation.

If you are unable to depart by the date stated above, an additional period of time may be granted if, prior to the above date, you appear at this office with confirmed arrangements for your departure.

WHEN YOU APPEAR IN PERSON ON DECEMBER 13, 1961 BRING IN YOUR ITALIAN PASSPORT.

Very truly yours,

P. A. ESPERDY
District Director

By MASIL J. MASON
Supervisory Deportation Officer

cc: James J. Cally, Esq.
150 B'way, NYC

3. Notice to Foti of Country of Deportation in Event of His Failure to Depart Voluntarily

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

NOTICE TO ALIEN OF COUNTRY TO WHICH HIS DEPORTATION HAS BEEN DIRECTED AND PENALTY FOR REENTRY WITHOUT PERMISSION

File No.: A15 724 917

Francisco Foti
74-11 18th Avenue
Brooklyn, N. Y.

Date: 11/29/61

Dear Sir:

In the event that you should fail to depart voluntarily within the time authorized then, pursuant to the order of deportation in your case and Section 243 of the Immigration and Nationality Act, your deportation to Italy has been directed. You should arrange your personal affairs accordingly.

After deportation, unless the Attorney General has expressly consented to your reapplying for admission, if you enter, attempt to enter, or are at any time found in the United States, you will be guilty of a felony, and, upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

Very truly yours,

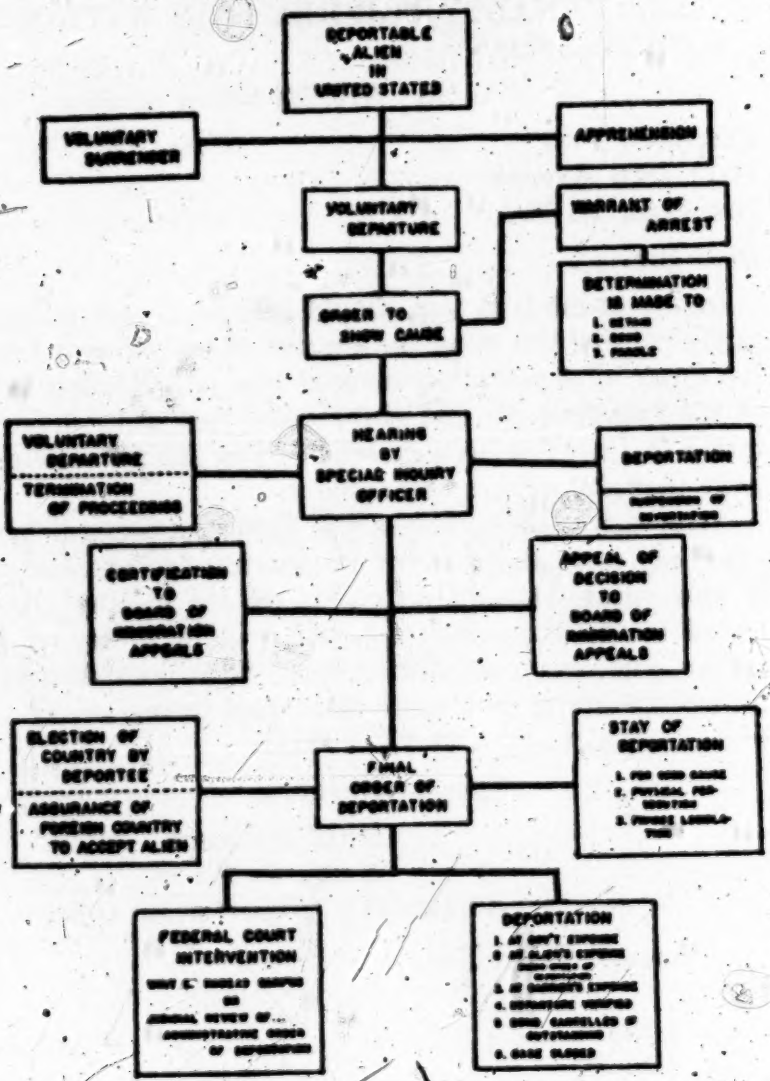
Masil J. Mason
MASIL J. MASON
Supervisory Deportation Officer

cc: James J. Cally, Esq.
FL/rs
Form I-294
(Rev. 6-10-58)

APPENDIX C

Chart outlining administrative procedures in deportation cases, as reproduced in H. Rep. 423, 86th Cong., 1st sess., p. 20, and H. Rep. 565, 87th Cong., 1st sess., p. 27 (see *supra*, pp. 28-29):

Deportation Case Procedures



☆ U. S. GOVERNMENT PRINTING OFFICE 1963—694721/P.O. 90